RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
APR 15 2016
OFFICE OF THE CLERK

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

W. STUART STULLER
Counsel of Record
CAPLAN AND EARNEST LLC
1800 Broadway
Suite 200
Boulder, CO 80302
(303) 443-8010
sstuller@celaw.com

Counsel for Respondent

April 15, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Procedural Posture	1
B. Statement of Facts	1
C. Proceedings Below	2
REASONS FOR DENYING THE PETITION	5
I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT	6
II. THE *ROWLEY* DECISION	7
III. CONGRESS AND *ROWLEY*	9
IV. THE "SPLIT" IS NOT GENUINE OR OUTCOME DETERMINATIVE	10
A. Every Circuit Applies the Central Holding of *Rowley*	10
B. Different Adjectives Do Not Represent Different Standards	12
C. Courts Treat the Adjectives as Complementary	16
D. The Third and Sixth Circuits Are Not Outliers	21
V. THE RISKS OF REVISITING *ROWLEY*	26
VI. THE DECISION TO IMPOSE A HIGHER STANDARD BELONGS TO THE LEGISLATURES	27
CONCLUSION	29

TABLE OF CONTENTS—Continued

APPENDIX Page

20 U.S.C. § 1401(9) 1a
20 U.S.C. § 1401(26) 1a
20 U.S.C. § 1401(29) 2a
20 U.S.C. § 1412(a)(1)(A) 2a
20 U.S.C. § 1414(d) 3a

TABLE OF AUTHORITIES

CASES — Page(s)

Adam v. Keller Indep. Sch. Dist.,
328 F.3d 804 (5th Cir. 2003) 25

Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.,
375 F.3d 603 (7th Cir.), *cert. denied*,
543 U.S. 1009 (2004) ..... *passim*

Anchorage Sch. Dist. v. M.P.,
689 F.3d 1047 (9th Cir. 2012) 24

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
548 U.S. 291 (2006) 6, 9

Bd. of Educ. v. Diamond,
808 F.2d 987 (3d Cir. 1986) 18

Bd. of Educ. of Hendricks Hudson Sch. Dist. v. Rowley,
458 U.S. 176 (1982) ..... *passim*

Burilovich v. Bd. of Educ.,
208 F.3d 560 (6th Cir.),
cert. denied, 531 U.S. 957 (2000) 28, 29

Cothern v. Mallory,
565 F.Supp. 701 (W.D. Mo. 1983) 28, 29

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,
118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998) 18, 19, 20

D.B. ex rel. Elizabeth B. v. Esposito,
675 F.3d 26 (1st Cir. 2012) 16, 17, 23

TABLE OF AUTHORITIES—Continued

Page(s)

D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595 (2d Cir. 2005) 17

D.S. v. Bayonne Bd. of Ed., 602 F.3d 553 (3d Cir. 2010) 11, 17

Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 (7th Cir. 2001) 25

Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005) 17, 22, 23, 24

Doe ex rel. Doe v. Smith, 879 F.2d 1340 (6th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990) 22

Employment Div. v. Smith, 494 U.S. 872 (1990) 10

Fontenot v. Louisiana Bd. of Elementary & Secondary Educ., 805 F.2d 1222 (5th Cir. 1986) 10

G.D. v. Westmoreland Sch. Dist., 930 F.2d 942 (1st Cir. 1991) 28, 29

Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027 (8th Cir. 2000) 28

Hall by Hall v. Vance Cnty. Bd. of Educ., 774 F.2d 629 (4th Cir. 1985) 18

Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060 (7th Cir. 2007), *cert. denied*, 554 U.S. 930 (2008) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P., 582 F.3d 576 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010) 11

J.L. v. Mercer Island Sch. Dist., 592 F.3d 938 (9th Cir. 2009) ..... *passim*

Jefferson Cnty. Sch. Dist. v. Elizabeth E., 702 F.3d 1227 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 2857 (2013) 5, 14, 15

JSK v. Hendry Cnty. Sch. Bd., 941 F.3d 1563 (11th Cir. 1991) 14, 20

K.D. v. Dep't of Educ., 665 F.3d 1110 (9th Cir. 2011) 12

K.E. v. Indep. Sch. Dist., 647 F.3d 795 (8th Cir. 2011) 27

Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir.), *cert. denied*, 533 U.S. 950 (2001) 11

Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687 (3d Cir. 1981) 25

L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2005) 22

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) 10

Leggett v. District of Columbia, 793 F.3d 59 (D.D.C. 2015) 11

Lenn v. Portland Sch. Cmty., 998 F.2d 1083 (1st Cir. 1993) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Lessard v. Wilton Lyndeborough Sch. Dist., 518 F.3d 18 (1st Cir. 2008) 9, 11, 16

Lt. T.B. ex rel. N.B. v. Warwick Sch. Cmty., 361 F.3d 80 (1st Cir. 2004) 16-17

M.B. ex rel. Berns v. Hamilton Southeastern Schs., 668 F.3d 851 (7th Cir. 2011)..... 19

M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir. 2014)..... 24

M.S. v. Fairfax Cnty. Sch. Bd., 553 F.3d 315 (4th Cir. 2009)..... 11

Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2d Cir. 1997) 19

N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Dirs., Missoula Cnty., Mont., 541 F.3d 1202 (9th Cir. 2008)..... 24

O.S. v. Fairfax Cnty. Sch. Bd., 804 F.3d 354 (4th Cir. 2015)..... 9, 20

P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ., 546 F.3d 111 (2d Cir. 2008) 19

Polk v. Cent. Susquehanna Inter. Unit 16, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989)..... 21, 22

R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173 (11th Cir. 2014)..... 12

R.P. ex rel. C.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117 (9th Cir. 2011)..... 24

TABLE OF AUTHORITIES—Continued

Page(s)

Renner v. Bd. of Educ.,
185 F.3d 635 (6th Cir. 1999) 23, 28, 29

Reyes v. New York Dep't of Educ.,
760 F.3d 211 (2d Cir. 2014) 11

Ridgewood Bd. of Educ. v. N.E.,
172 F.3d 238 (3d Cir. 1999) 21, 22

Roland M. v. Concord Sch. Dist.,
910 F.2d 983 (1st Cir. 1990), *cert. denied*, 499 U.S. 912 (1991) 28, 29

Sch. Bd. v. K.C.,
285 F.3d 977 (11th Cir. 2002) 19

Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett,
440 F.3d 1007 (8th Cir. 2006) 12

Smith v. Robinson,
468 U.S. 992 (1984) 10

Sytsema ex rel. Sytsema v. Academy Sch. Dist. No. 20,
538 F.3d 1306 (10th Cir. 2008) 12, 20, 23

T.R. v. Kingwood Twp. Bd. of Educ.,
205 F.3d 572 (3d Cir. 2000) 13, 21, 27

Thompson R-2J Sch. Dist. v. Luke P. ex rel. Jeff P.,
540 F.3d 1143 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009) 13, 15

Town of Burlington v. Dep't of Educ. of Mass., 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720 (10th Cir. 1996) 14

Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119 (2d Cir. 1998) 18, 19

CONSTITUTION

U.S. Const. art. I, § 8. cl. 1 ..... 6, 7, 9

STATUTES

Education for All Handicapped Children Act of 1975, Pub.L. No. 94-142, 89 Stat. 773 (1975) 5

Education of the Handicapped Act Amendments of 1983, Pub.L. No. 98-199, 97 Stat. 1357 (1983) 9

Education of the Handicapped Amendments of 1986, Pub.L. No. 99-457, 100 Stat. 1145 (1986) 9

Education of the Handicapped Children Act of 1990, Pub.L. No. 101-476, 104 Stat. 1103 (1990) 9

§ 901(a)(1), 104 Stat. 1141-42 (1990) 5

Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, 100 Stat. 796 (1985) 10

Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 111 Stat. 37 (1997) 9

TABLE OF AUTHORITIES—Continued

	Page(s)
Individuals with Disabilities Education Improvement Act of 2004, Pub.L. No. 108-446, 118 Stat. 2647 (2004)	9
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1482	*passim*
20 U.S.C. § 1401(3)	1
20 U.S.C. § 1401(9)	3, 7
20 U.S.C. § 1401(9)(B)	28
20 U.S.C. § 1401(19)	7
20 U.S.C. § 1401(26)	7
20 U.S.C. § 1412(a)(1)(a)	6
20 U.S.C. § 1412(a)(10)(C)(ii)	3
20 U.S.C. § 1414(a)(1)(A)	2
20 U.S.C. § 1414(d)	7
20 U.S.C. § 1414(d)(1)(A)(i)	7
20 U.S.C. § 1415(i)(3)(B)(i)	10
20 U.S.C. § 1415(l)	10
Lilly Ledbetter Fair Pay Act of 2009, Pub.L. No. 111-2, 123 Stat. 5	10
Religious Freedom Restoration Act of 1993, Pub.L. No. 103-141, 107 Stat. 1488	10

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Clare McCann, *IDEA Funding*, New America EdCentral, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution (last visited April 11, 2016) 29

H.R. Rep. No. 94-332 (1975) 8

Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after* Rowley?, 39 Suffolk U.L. Rev. 1 (2005) 15, 16

Nat'l Center for Educ. Statistics, Digest of Education Statistics, Table 204.30: Children 3 to 21 Years Old Served under IDEA, Part B (2013), *available at* https://nces.ed.gov/programs/digest/d13/tables/dt13_204.30.asp 27

Ron Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1 (2009) 16

S. Rep. No. 94-168 (1975) 8

Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25 (2012) 28

STATEMENT OF THE CASE

A. Procedural Posture

Joseph and Jennifer F., on behalf of their son, Petitioner Endrew F., initiated an administrative action under the Individuals with Disabilities Education Act (IDEA),[1] contending that Respondent Douglas County School District RE-1 did not provide Endrew with a free appropriate public education within the meaning of the IDEA. An administrative law judge (ALJ) ruled in favor of the School District. Petitioner initiated an action for review in federal court. The district court affirmed the ALJ's decision. Petitioner appealed to the Tenth Circuit Court of Appeals which also affirmed. Petitioner asks this Court to review the Tenth Circuit's decision.

B. Statement of Facts

Endrew is a child with autism, a disability that impacts his cognitive functioning, as well as his language, social, and adaptive skills, making him eligible for the protections of the IDEA. Pet. App. 60a; 20 U.S.C. § 1401(3). He attended the School District's preschool program, kindergarten, first, and second grade. During first and second grade, he received approximately twenty hours a week of specialized services and was assigned a full-time paraprofessional to keep him on task and to deescalate his disruptive behaviors. Pet. App. 61a-62a. He progressed academically and socially, but continued to exhibit problem behaviors such as tantrums, yelling, elopements, and unplanned urinations. Pet. App. 63a.

---

[1] 20 U.S.C. §§ 1401-1482.

Endrew transferred to his neighborhood school for his third grade year. Pet. App. 64a. The transition was difficult. His maladaptive behaviors continued, but he progressed academically. Pet. App. 64a-65a. The following year his problem behaviors increased, but he continued to progress toward his academic and functional goals. Pet. App. 66a-67a.

A new individualized education program or IEP, dated April 13, 2010, was drafted with goals that were nearly identical to the previous year's goals. Pet. App. 66a-67a. The goals were written in broad terms such as "the student will improve writing skills as measured by the following objectives." Pet. App. 76a-77a. While the goals remained the same, the objectives were changed to reflect higher expectations. Pet. App. 77a.

In May, Endrew's parents notified the School District that they intended to enroll Endrew in a private school, expressing concern about his academic and social progress. Pet. App. 67a-68a. In July, Endrew's private school found that he had mastered many of the objectives on his public school IEP. Pet. App. 71a. The private school later adopted several of the goals and objectives from the School District's IEP into its own IEP. Pet. App. 78a.

Endrew's parents initiated an action under the IDEA seeking reimbursement for the cost of Endrew's private school.

C. Proceedings Below

The IDEA requires school districts to make a free appropriate public education available to children with disabilities. 20 U.S.C. § 1414(a)(1)(A). A free

appropriate public education consists of special education and related services that are provided pursuant to a properly developed individualized education program (IEP). 20 U.S.C. § 1401(9). A school district provides a free appropriate public education to a child with a disability if it develops the child's IEP in accordance with the Act's procedures and the IEP is "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. of Hendricks Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Parents who believe that the local school district is not providing their child with a free appropriate public education may enroll the child in a private school and obtain reimbursement from the school district for the cost of the private school if they prove that the school district did not provide their child with a free appropriate public education. 20 U.S.C. § 1412(a)(10)(C)(ii).

Endrew's parents argued that Endrew did not receive a free appropriate public education pointing to IEP goals that changed little over the years. Pet. App. 76a. The ALJ, however, found that the goals were written in broad terms that incorporated underlying objectives, *e.g.*, "the student will improve writing skills as measured by the following objectives." Pet. App. 76a-77a. The ALJ explained: "[W]hile the goals remained the same, the objectives changed from year-to-year taking into account [Endrew]'s progress. As [Endrew] progressed, the objectives were modified or replaced with new objectives and/or the measuring criteria were modified to reflect a higher level of expectation." Pet. App. 77a.

The ALJ ruled:

> An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-07. The goals and objectives in [Endrew]'s April 13, 2010 IEP are both clear and objectively measurable and [Endrew] was making progress toward those goals. The most persuasive evidence of this came from the [Private School] witnesses. Shortly after [Endrew]'s enrollment at [Private School], in July 2010, [Private School] used the District's goals, objectives and criteria in the April 13, 2010 IEP to evaluate [Endrew]'s academic and functional performance. The [Private School] staff concluded that [Endrew] had made progress towards and/or mastered several of the goals/objectives in [Endrew's] IEP. [Private School] also adopted several of the District's goals and objectives, some with modification, into its own IEP later that fall. Both the District's and the [Private School]'s education records show that [Endrew] was making some measurable progress on the goals and objectives in [Endrew's] April 13, 2010 IEP.

Pet. App. 77a-78a.[2]

The ALJ denied the parents' request for reimbursement.

---

[2] Endrew's parents also raised procedural issues. Pet. App. 78a-81a. The Petition does not seek review of any procedural rulings.

Endrew's parents initiated an action for judicial review of the ALJ's decision. The district court reviewed the underlying testimony and exhibits, and affirmed the ALJ's decision, stating that the parents failed to prove that the District's IEP "was not reasonably calculated to provide *some* educational benefit." Pet. App. 41a-51a (emphasis added).

Endrew's parents appealed to the Tenth Circuit Court of Appeals arguing that a recent Tenth Circuit decision, *Jefferson Cnty. School District v. Elizabeth E.*,[3] had adopted the "meaningful benefit" standard, marking a "fundamental shift" in circuit precedent. Pet. App. 19a. The Tenth Circuit rejected their contention, explaining that its references to "meaningful" in *Elizabeth E.* did not represent a change in the circuit's approach, adding, "Although the 'meaningful benefit' standard is purportedly higher than the 'some benefit' standard, the difference between them – that is, how much *more* benefit a child must receive for it to be meaningful – is not clear." Pet. App. 17a, n.8 (emphasis in original). The Tenth Circuit affirmed the district court's decision.

REASONS FOR DENYING THE PETITION

Thirty-four years ago, this Court addressed the following question: "What is meant by the [Individuals with Disabilities Education Act]'s[4] requirement of a 'free appropriate public education.'" *Rowley*, 458 U.S.

---

[3] 702 F.3d 1227 (10th Cir. 2012), *cert. denied*, 133 S.Ct. 2857 (2013).

[4] At the time, the Act was known as the "Education for All Handicapped Children Act of 1975." *Rowley*, 458 U.S. at 180. The Act received its current name in 1990. *See* Pub.L. 101-476, Section 901(a)(1), 104 Stat. 1103, 1141-42 (1990). This brief will refer to all iterations of the Act as the IDEA.

at 186. The Petition asks the Court to give a different answer to a question that the Court already has answered.

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Congress enacted the IDEA pursuant to its Spending Clause power. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). The IDEA provides federal funds to states, but conditions the funding on states' compliance with the requirements of the Act. *Rowley*, 458 U.S. at 179. When Congress uses its Spending Clause authority to attach conditions to federal funding, it must set out the conditions clearly and unambiguously. *Murphy*, 548 U.S. at 296.

The IDEA requires states to make a "free appropriate public education" available to children with disabilities. 20 U.S.C. § 1412(a)(1)(a). Consistent with the clarity required by the Spending Clause, the Act expressly defines free appropriate public education:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9). The Act also expressly defines "special education"[5] and "related services,"[6] and details the procedures that schools must follow in developing a child's individualized education program or IEP. 20 U.S.C. § 1414(d). An IEP is a planning document that identifies the child's levels of achievement and performance, goals, and the special education and related services that will be provided so that the child can progress toward those goals. 20 U.S.C. § 1414(d)(1)(A)(i).

In short, the IDEA's procedural requirements are a model of Spending Clause clarity. The question posed by the Petition, and previously answered by *Rowley*, is to what extent does the IDEA impose *substantive* requirements regarding educational outcomes.

II. THE *ROWLEY* DECISION

Rowley focused its analysis on the statutory definition of a free appropriate public education, noting that the Act expressly defined the term, and defined its constituent parts. 458 U.S. at 187-190. The Court observed: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189. The Court explained:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access

---

[5] 20 U.S.C. § 1401(26).

[6] 20 U.S.C. § 1401(19).

> meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep. No. 94-168 [(1975)], at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192; *see also id.* at 200 (quoting H.R. Rep. No. 94-332 [(1975)] at 14, "no congressional legislation has required a precise guarantee for handicapped children").

The Court recognized that it would do little good for Congress to spend millions of dollars to provide access to public education if disabled children received no benefit from that education. *Id.* at 200. Therefore, "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.*

Rowley established a two-part test to determine whether a child has received a free appropriate public education:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied

> with the obligations imposed by Congress and the courts can require no more.

Id. at 206-07.

Recognizing that the Act covered children with challenges that ranged from the mild to the profound, the Court declined to establish a single test to determine the adequacy of educational benefits required by the Act. *Id.* at 202.

III. CONGRESS AND *ROWLEY*

Congress can overrule or modify *Rowley* if it wishes to do so. *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015). Congress has amended the IDEA five times since *Rowley* but never expressed concern with this Court's decision or changed the definition of free appropriate public education. *See generally* Pub.L. No. 98-199, 97 Stat. 1357 (1983); Pub.L. No. 99-457, 100 Stat. 1145 (1986); Pub.L. No. 101-476, 104 Stat. 1103 (1990); Pub.L. No. 105-17, 111 Stat. 37 (1997); Pub.L. No. 108-446, 118 Stat. 2647 (2004).

Some persons have argued that legislative changes that do not address the IDEA's definition of free appropriate public education have changed *Rowley*. *Lessard v. Wilton Lyndeborough Sch. Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008) (rejecting contention that 1997 amendment of definition of "transition services" overruled *Rowley*). Given that the IDEA is Spending Clause legislation, requiring Congress to clearly and unambiguously state its requirements,[7] it is unlikely that Congress would, or could, change the central requirement of the IDEA in such an elliptical manner. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 950 (9th Cir. 2009).

---

[7] *Murphy*, 548 U.S. at 296.

Moreover, when Congress changes a statute in response to a Supreme Court decision, it generally does so explicitly. *See, e.g.*, Pub.L. No. 111-2, 123 Stat. 5 (Lilly Ledbetter Fair Pay Act of 2009) (responding to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); Pub.L. No. 103-141, 107 Stat. 1488 (Religious Freedom Restoration Act of 1993) (responding to *Employment Div. v. Smith*, 494 U.S. 872 (1990)). Indeed, when this Court held in *Smith v. Robinson* that the IDEA was the exclusive avenue through which children with disabilities could pursue claims related to their education and that attorney fees were not available under the Act,[8] "Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent." *Fontenot v. Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986); *see generally* Pub.L. No. 99-372, 100 Stat. 796; codified at 20 U.S.C. § 1415(i)(3)(B)(i) (attorneys fees); 20 U.S.C. § 1415(l) (preserving claims under other laws).

In short, Congress regards *Rowley* as settled law.

The Petition, however, argues that *Rowley* must be revisited because the federal circuits are in "disarray" over its meaning. Pet. 9.

IV. THE "SPLIT" IS NOT GENUINE OR OUTCOME DETERMINATIVE

A. Every Circuit Applies the Central Holding of *Rowley*.

The standard set by *Rowley*—"reasonably calculated to enable the child to receive educational benefits"—is

---

[8] 468 U.S. 992, 1009-10, 1013 (1984).

followed by every circuit in the federal system. *Leggett v. District of Columbia*, 793 F.3d 59, 70 (D.D.C. 2015) ("[A]n IEP is generally 'proper under the Act' if 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Lessard*, 518 F.3d at 27 (First Circuit) ("[W]e start with the *Rowley* Court's mandate that IEP components must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Reyes v. New York Dep't of Educ.*, 760 F.3d 211, 221 (2d. Cir. 2014) (school districts must "formulate an IEP that is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *D.S. v. Bayonne Bd. of Ed.*, 602 F.3d 553, 564 (3d. Cir. 2010) ("[A] reviewing court must . . . determine whether the educational program was 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *M.S. v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 319 (4th Cir. 2009) ("[A]n IEP must ultimately be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583-84 (5th Cir. 2009) ("The court must . . . determine whether the IEP developed through such procedures was 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207), *cert. denied*, 559 U.S. 1007 (2010); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 763 (6th Cir. 2001) ("[T]he court must determine whether the IEP, developed through the IDEA's procedures, is reasonably calculated to enable the child to receive educational benefits.") (citing *Rowley*, 458 U.S. 207), *cert. denied*, 533 U.S. 950; *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 613 (7th Cir.

2004) ("[A]n IEP is valid when . . . it is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207), *cert. denied*, 543 U.S. 1009 (2004); *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) ("To pass substantive muster, the IEP must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 206-07); *K.D. v. Dep't of Educ.*, 665 F.3d 1110, 1122 (9th Cir. 2011) ("The court must determine . . . whether the state developed an IEP that is 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *Sytsema ex rel. Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1315 (10th Cir. 2008) ("[F]ederal courts must determine whether a school district substantively complied with the Act by focusing on whether 'the [IEP] developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207); *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1182 (11th Cir. 2014) ("[T]he IEP must be 'reasonably calculated to enable the child to receive educational benefits.'") (quoting *Rowley*, 458 U.S. at 207).

B. Different Adjectives Do Not Represent Different Standards.

The "split" identified by the Petition is not a genuine outcome-determinative split. Rather, the "split" is one of adjectives, not outcomes. An examination of the relevant case law demonstrates that the different circuits use different adjectives to describe the same core requirement of *Rowley* that a child's IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. Every circuit

follows this command, and no circuit has strayed from *Rowley*'s central holding.

The Petition labels the allegedly conflicting standards as the "substantial benefit" standard and the "just above trivial benefit" standard. Pet. 10-11. These labels, of course, are simply more adjectives. Moreover, they are adjectives selected by the Petition, not referenced by the circuits to which they are attributed. The Petition attributes the "substantial benefit" label to the Third Circuit. Pet. 10. The Third Circuit, however, has never used that label in any decision, and generally uses the label "meaningful." *E.g., T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) ("By failing to inquire into whether the Board's IEP would confer a *meaningful* educational benefit . . . .") (emphasis in original). Similarly, the "just above trivial" label is not used by any circuit. Instead, the label attributed to other circuits is "some." *E.g., Thompson R-2J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) ("Congress sought only to require a basic floor of opportunity, aimed at providing individualized services sufficient to provide every eligible child with *some* educational benefit.") (emphasis in original) (citations and internal quotation marks omitted), *cert. denied*, 555 U.S. 1173 (2009).

The term "meaningful" is drawn from *Rowley*'s statement that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*." 458 U.S. at 192 (emphasis added). The term "some" is drawn from *Rowley*'s statement that "the education to which access is provided [must] be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added).

Rowley, of course, did not establish two conflicting standards. Instead, it spoke of access ("meaningful"), and benefit ("some"), explaining "that the education to which access is provided [must] be sufficient to confer some educational benefit upon the handicapped child." *Id.*; *see also id.* at 214 (White, J., dissenting) ("meaningful access" is provided by an IEP that confers "some educational benefit"); *J.L.*, 592 F.3d at 951 n.2 ("As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to 'make such access meaningful,' confer at least 'some educational benefit' on disabled students."); *JSK v. Hendry Cnty. Sch. Bd.*, 941 F.3d 1563, 1572 (11th Cir. 1991) ("We disagree to the extent that 'meaningful' means anything more than 'some' or 'adequate' educational benefit.").

Nonetheless, advocates are quick to point to a court's selection of a particular adjective as evidence that the court has made a conscious decision to align itself with a choice that the advocates insist determines the outcome of the case. This is precisely what happened here. The Tenth Circuit used the word "some" to describe the educational benefits required by *Rowley* for nearly twenty years. *Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996).

Then, in 2012, the majority and concurring opinions used the word "meaningful" in *Elizabeth E.*,[9] prompting Petitioner to argue that the Tenth Circuit had

---

[9] 702 F.3d at 1234, 1238 (Murphy, J., majority opinion); *id.* at 1243 (Gorsuch, J., concurring).

adopted a newer and higher substantive standard.[10] Pet. App. 19a. The Tenth Circuit explained that *Elizabeth E.*'s use of the different adjectives did not represent a sea change, and cautioned that the substantive difference between "some benefit" and "meaningful benefit" is not clear. Pet. App. 17a n.8, 19a-21a.

While the Petition attempts to describe a clear and decisive split, the split is not so clear or decisive that observers agree on what circuits subscribe to what standard. The Petition outlines a split with eight circuits (the First, Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh) applying a "just above trivial" standard, two circuits (the Third and Sixth) applying a "substantial benefit" standard, one circuit (the D.C. Circuit) avoiding adjectives altogether in favor of "educational benefit," and one circuit (the Ninth) using both terms. Pet. 10-14. In contrast, a commentator cited by the Petition[11] describes a split with six circuits (the Second, Third, Fourth, Fifth, Sixth, and Ninth) using "meaningful benefit," four circuits (the First, Eighth, Eleventh, and D.C.) using "some benefit," and one circuit (the Seventh) using both terms. Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after* Rowley*?*, 39 Suffolk U.L. Rev. 1, 7 (2005). Still another commentator outlines a split with seven circuits (the First, Fourth, Seventh,

---

[10] It is worth noting that the author of the concurring opinion in *Elizabeth E.*, authored the *Luke P.* decision, that Petitioner contended was overruled by *Elizabeth E. Compare Luke P.*, 540 F.3d at 1149 (Gorsuch, J.) ("*some* educational benefit") (emphasis in original) *with Elizabeth E.*, 702 F.3d at 1243 (Gorsuch, J., concurring) (using "meaningful educational benefit").

[11] Pet. 12-13.

Eighth, Tenth, Eleventh, and D.C.) using "some benefit," one circuit (the Third) using "meaningful benefit," and four circuits (the Second, Fifth, Sixth, and Ninth) using both terms. Ron Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Educ. L. Rep. 1 (2009). The only circuit that all three observers identify as using "meaningful benefit" is the Third Circuit.[12] The three authors place the Second and Fifth Circuits in three different categories.[13]

C. Courts Treat the Adjectives as Complementary.

While advocates must use adjectives to their advantage, courts make far less of the adjectives than advocates. The Tenth Circuit is not the only circuit to reflect a lack of fidelity in its choice of adjectives. The First Circuit has used at least three adjectives to describe the educational benefits required by *Rowley*. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 36 (1st Cir. 2012) ("likelihood that the IEP will confer a *meaningful* educational benefit") (emphasis added); *Lessard*, 518 F.3d at 23-24 ("IEP need only supply '*some* educational benefit'") (emphasis added); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Cmty.*, 361 F.3d 80, 82 (1st

---

[12] Pet. 10; Aron, 39 Suffolk U.L. Rev. at 7; Wenkart, 247 Educ. L. Rev. at 17-19.

[13] Pet. 13 (Second Circuit requires "just above trivial benefit"); Aron, 39 Suffolk U.L. Rev. at 7 (Second Circuit requires "meaningful benefit"); Wenkart, 247 Educ. L. Rev. at 19-20 (Second Circuit uses both terms); *see also* Pet. 13 (Fifth Circuit requires "just above trivial benefit"); Aron, 39 Suffolk U.L. Rev. at 7 (Fifth Circuit requires "meaningful benefit"); Wenkart, 247 Educ. L. Rev. at 22-23 (Fifth Circuit uses both terms).

Cir. 2004) (IEP must be "reasonably calculated to provide an *appropriate* education") (emphasis added).

Courts routinely treat the different adjectives as complementary terms, not outcome-determinative distinctions:

> The Supreme Court has said that an IEP must offer only "*some educational benefit*" to a disabled child. Thus, the IDEA sets "modest goals: it emphasizes an *appropriate* rather than an ideal, education; it requires an *adequate*, rather than an optimal, IEP." At the same time, the IDEA calls for *more than a trivial* educational benefit, in line with the intent of Congress to establish a "federal basic floor of meaningful, beneficial educational opportunity." Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a *meaningful* educational benefit.

D.B. v. Esposito, 675 F.3d 26, 34-35 (1st Cir. 2012) (emphases added) (internal citations and parentheticals omitted). The foregoing statement is supported by citations from the allegedly "conflicting" First, Second, Third, and Sixth Circuits without any indication, such as a "*but see*" preface, that these circuits are on opposite sides of an outcome-determinative divide. *Id.*, *citing Lenn v. Portland Sch. Cmty.*, 998 F.2d 1083, 1086 (1st Cir. 1993); *Town of Burlington v. Dep't of Educ. of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985); *D.S.*, 602 F.3d at 557 (Third Circuit); *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

The Seventh Circuit is similarly eclectic in identifying its influences:

> An IEP passes muster provided that it is "reasonably calculated to enable the child to receive educational benefits" or, in other words, when it is "likely to produce progress, not regression or trivial educational advancement." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (*quoting Bd. of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986)); *accord Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). The requisite degree of reasonable, likely progress varies, depending on the student's abilities. Under *Rowley*, "while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children." *Hall by Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

Alex R., 375 F.3d at 615. The Seventh Circuit even has conjoined the "conflicting" adjectives. *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007) (IEP provided "*some meaningful* educational benefit") (emphasis added), *cert. denied*, 554 U.S. 930 (2008).

The Fifth Circuit asks whether a child's IEP is calculated to yield "positive" educational benefits,[14] a term that has made its way into cases from the

---

[14] *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

Second,[15] Seventh,[16] and Eleventh[17] Circuits without any indication that "positive educational benefits" differs in some substantive way from "some," "meaningful," "appropriate," or "adequate." *See Sch. Bd. v. K.C.*, 285 F.3d 977, 982 n.6 (11th Cir. 2002) ("It is unnecessary for us to decide whether these [*Cypress-Fairbanks*] factors constitute the test in this circuit because they are at least as stringent as any standard this circuit has articulated.").

Circuits define the different adjectives in remarkably similar ways. For example, the Second Circuit has held that "meaningful benefit" "contemplates more than mere trivial advancement." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120-1121 (2d Cir. 1997); *see also P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 130 (2d Cir. 2008) ("IEP must provide the opportunity for more than only 'trivial advancement'"). The Tenth Circuit describes "some benefit" in virtually identical fashion: "This circuit has long subscribed to the *Rowley* Court's 'some educational benefit' language in defining a FAPE, and interpreted it to mean that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" Pet. App. 16a. The Fourth Circuit defines "meaningful" in the same fashion as the First

---

[15] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

[16] *M.B. ex rel. Berns v. Hamilton Southeastern Schs.*, 668 F.3d 851, 862 (7th Cir. 2011) (citing *Cypress-Fairbanks*, 118 F.3d at 253); *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir. 2004) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

[17] *Sch. Bd. v. K.C.*, 285 F.3d 977, 982-83 (11th Cir. 2002) (citing *Cypress-Fairbanks*, 118 F.3d at 253).

Circuit defines "meaningful,"[18] and uses "some" in the same manner as the Tenth Circuit uses "some." *O.S.*, 804 F.3d at 359 ("[W]e have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial.'").

Other circuits have defined the adjective-free phrase "educational benefits" used in *Rowley* in the same way. *Cypress-Fairbanks*, 118 F.3d at 248 (IEP must be "reasonably calculated to enable the child to receive educational benefits or, in other words, when it is likely to produce progress, not regression, or trivial educational advancement") (Fifth Circuit); *Alex R.*, 375 F.3d at 615 ("IEP is reasonably calculated to enable the child to receive an educational benefit when it is likely to produce progress, not regression or trivial educational advancement") (Seventh Circuit).

While the Tenth Circuit notes the difficulty of distinguishing between "some" and "meaningful,"[19] the Eleventh Circuit does not see any distinction: "We disagree to the extent that 'meaningful' means anything more than 'some' or 'adequate' educational benefit." *JSK*, 941 F.3d at 1572. The Ninth Circuit agrees: "As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to 'make such access meaningful,' confer at least 'some educational benefit' on disabled students." *J.L.*, 592 F.3d at 951 n.2.

---

[18] *O.S.*, 804 F.3d at 359 ("Using 'meaningful,' as the Court also did in *Rowley*, was simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress.").

[19] *Sytsema*, 538 F.3d at 1313.

D. The Third and Sixth Circuits Are Not Outliers.

The Petition asks the Court to resolve a perceived distinction based on language used by the Third and Sixth Circuits. The proposed distinction, however, is not consequential.

The Third Circuit began with the same understanding as the other circuits: "[W]hen the Supreme Court said 'some benefit' in *Rowley*, it did not mean 'some' as opposed to 'none.' Rather, 'some' connotes an amount of benefit greater than mere trivial advancement." *Polk v. Cent. Susquehanna Inter. Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). Later, however, the Circuit explained: "[T]he standard set forth in *Polk* requires 'significant learning' and 'meaningful benefit.' The provision of merely 'more than a trivial educational benefit' does not meet these standards." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Ridgewood did not articulate how much more than "merely more than trivial" is necessary to satisfy the IDEA. A subsequent Third Circuit opinion, however, referred to the *Ridgewood* standard as only "somewhat more stringent," and affirmed a district court's decision that an IEP satisfied the IDEA notwithstanding the fact that the lower court applied the "merely more than trivial" understanding of *Polk*. *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000). Still later, the Third Circuit rejected a parent's argument that a lower court erred by applying the "some benefit" test, stating, "We see no error; indeed, the same language – 'some educational benefit' – is found in our *Kingwood Township* decision. That decision clearly confirmed that 'some educational

benefit' requires provision of a 'meaningful educational benefit,' the standard the ALJ clearly and accurately outlined earlier in her opinion." *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 395 (3d Cir. 2005) (internal citation omitted). Thus, if the Third Circuit has strayed from *Rowley* or other circuits, it has not strayed far, or for long.

The Sixth Circuit initially relied on *Polk* to define "appropriate" to mean "more than *de minimis*,"[20] then later adopted *Ridgewood*'s understanding that "meaningful" means something more than "merely more than trivial." *Deal*, 392 F.3d at 861. *Deal*, however, indicated that *Rowley* was unequipped to address a situation where one methodology (the so-called Lovaas methodology) appeared to offer the hope of self-sufficiency while the school district's methodology did not: "The legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence." *Id.* at 861-62, 863. *Rowley*, however, devoted an entire section of the opinion to an exploration of legislative history. 458 U.S. at 191-204. Nothing in that discussion supports *Deal*'s representation of the history. *Id.* at 203 (statutory language and legislative history make clear that schools comply with IDEA "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."). In addition, *Deal*'s willingness to resolve disputes over methodologies ignored *Rowley*'s admonition that "once a court determines that the requirements of the Act have been met, questions of

---

[20] *Doe ex rel. Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990).

methodology are for resolution by the States." *Id.* at 208.

The Petition cites a brief submitted eleven years ago by the National School Boards Association in support of a petition for a writ of certiorari in *Deal* as support for granting this Petition. At the time, *Deal* could be seen as an express call for courts to set for new standards: "Nothing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit." *Deal*, 392 F.3d at 863, *but see Rowley*, 458 U.S. at 189 (substantive standard is "noticeably absent" from statute). Rather than serving as a turning point in IDEA jurisprudence, the passage of time has worn the edges off of *Deal*. The case has been cited by other circuits without any indication that it represents a fundamental shift in IDEA law. *See D.B.*, 675 F.3d at 35 (First Circuit citing *Deal* for the proposition that IEP must be reasonably calculated to confer meaningful educational benefit). The Tenth Circuit cited *Deal* for the proposition that the IDEA requires that IEP must be reasonably calculated to provide meaningful educational benefit, and then added that it is difficult to distinguish between "some benefit" and "meaningful benefit."[21] *Sytsema*, 538 F.3d at 1313.

To the extent that *Deal* caused any repercussions outside of the Sixth Circuit, it was in the Ninth Circuit where a panel cited *Deal* to support the proposition that 1997 amendments to the IDEA required courts to

---

[21] Prior to *Deal*, the Sixth Circuit held that a child's IEP satisfied Michigan's "maximum potential" standard notwithstanding the fact that the parents were demanding precisely the same Lovaas methodology. *Renner v. Bd. of Educ.*, 185 F.3d 635, 638, 645-46 (6th Cir. 1999). There has been no indication that *Deal*'s focus on methodology has undermined *Renner*.

apply the meaningful benefit standard. *N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Dirs., Missoula Cnty., Mont.*, 541 F.3d 1202, 1213 (9th Cir. 2008). It is a curious citation given that *Deal* did not discuss the 1997 amendments at all. Less than a year later, however, the Ninth Circuit reviewed all of the post-*Rowley* amendments to the IDEA, and noted that none of the amendments changed the definition of free appropriate public education or indicated dissatisfaction with *Rowley*. *J.L.*, 592 F.3d at 947-48, 951. The court added:

> Some confusion exists in this circuit regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with "educational benefit," "some educational benefit" or a "meaningful" educational benefit. *See, e.g., N.B. v. Hellgate Elem. Sch.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). As we read the Supreme Court's decision in *Rowley*, all three phrases refer to the same standard. School districts must, to "make such access meaningful," confer at least "some educational benefit" on disabled students.[22]

Id. at 951 n.2; *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1058 n.2 (9th Cir. 2012) (same); *see also R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1121, 1123 (9th Cir. 2011) (affirming district court's

---

[22] More recently, another panel revived the notion that the 1997 amendments required the use of the meaningful benefit standard but did not contend that "meaningful" means something other than "some." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014).

decision that IEP provided FAPE to student saying it provided "educational benefit").

As *Rowley* recognized, however, articulating a one-size-fits-all standard is not an achievable goal for a statute that applies to a child for whom learning to eat, dress, and toilet represents education,[23] to a hearing-impaired child whose academic performance is better than the average,[24] and to a child with superior cognitive skills but behavioral challenges who contends that he is not receiving a free appropriate public education because the school's curriculum is "beneath his abilities." *Adam v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). Minimal progress might be remarkable progress for the first student. *Rowley*, 458 U.S. at 202. In contrast, minimal progress for the third student might be due to factors unrelated to the child's IEP. *See generally Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817 (7th Cir. 2001) (student's lack of educational progress due to socially inappropriate behavior and substance abuse, not educational services).

While courts have used different adjectives to describe the educational benefits required by *Rowley*, *Rowley* has proved to be a remarkably durable decision in a complex and fact-intensive area of the law. There is no reason to disturb *Rowley*, and much danger in doing so.

---

[23] *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981).

[24] *Rowley*, 458 U.S. at 184-85.

V. THE RISKS OF REVISITING *ROWLEY*

The Petition contends that this case is a good vehicle for the Court to distinguish between "some" and "meaningful" benefit because the Tenth Circuit stated that this was a "close case." Pet. 19-21. The word "close," of course, is just another adjective, but an adjective that highlights the difficulty of the challenge presented by the Petition, that is, the challenge of articulating the difference between "some" and "meaningful," the words used by *Rowley*, and the relationship of those words to "appropriate," the word used by the statute.

The Petition argues that the Court can resolve the split by choosing an adjective. Pet. 20. If the Court chooses "some," the Petition concedes that the case is over. *Id.* If the Court chooses "meaningful," the Petition contends that the Court can remand the case to the lower court to apply the new adjective. *Id.* Simply choosing an adjective, however, resolves little. As the Tenth Circuit noted in this case, however, "how much *more* benefit a student must receive for [education] to be meaningful – is not clear." Pet. 17a n.8 (emphasis in original). As Justice White noted in *Rowley*, the word "'meaningful' is no more enlightening than 'appropriate.'" 458 U.S. at 214 (White, J., dissenting).

Here, the administrative hearing lasted three days. The district court's discussion of the evidence covers ten pages. Pet. App. 41a-51a. If this Court is going to recognize a distinction between "some" and "meaningful," and bring clarity to the distinction, it will have to review the entire administrative record, and articulate precisely where the educational benefit conferred by the School District's IEP satisfied "some," but fell short of "meaningful," and articulate that

distinction in a way that can be applied in a principled manner to the 6.5 million IEPs that are created each year. Nat'l Center for Educ. Statistics, Digest of Education Statistics, Table 204.30: Children 3 to 21 Years Old Served under IDEA, Part B (2013), *available at* https://nces.ed.gov/programs/digest/d13/tables/dt13_204.30.asp.

The Petition represents, at most, a complaint from the borderline of a complex and fact-intensive area of law.[25] Different judges can review the same facts under the same standard and still reach conflicting opinions. *See generally K.E. v. Indep. Sch. Dist.*, 647 F.3d 795, 811-22 (8th Cir. 2011) (Bye, J., dissenting). They also can view the same facts under different standards, and reach the same conclusion. *T.R.*, 205 F.3d at 577 (affirming judgment of lower court that IEP satisfied the IDEA notwithstanding the fact that the lower court applied a somewhat less stringent standard). Borderline cases will exist for as long as there are borders. Changing a border will not eliminate borderline cases. If the new border cannot be articulated with greater clarity than the old border, borderline cases will increase.

VI. THE DECISION TO IMPOSE A HIGHER STANDARD BELONGS TO THE LEGISLATURES

Finally, to the extent that the Petition asks the Court to intervene to set a higher substantive standard than *Rowley*, Petitioner has remedies in other forums. First, Congress can amend the IDEA. In addition, the definition of free appropriate public

---

[25] The School District does not concede that this case is close. Three different courts – five judges – unanimously ruled in the School District's favor.

education requires that the special education and related services must "meet the standards of the State educational agency." 20 U.S.C. § 1401(9)(B). "If state legislation implementing IDEA creates a higher standard than the federal minimum, an individual may bring an action under the federal statute seeking to enforce the state standard." *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000). Some states have adopted higher standards by statute. *See generally Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565 (6th Cir.) (Michigan has "maximum benefit" standard), *cert. denied*, 531 U.S. 957 (2000); *Renner*, 185 F.3d at 645-46 (same); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 950 (1st Cir. 1991) (New Hampshire has "equal educational opportunities" standard); *Roland M. v. Concord Sch. Dist.*, 910 F.2d 983, 991-92 (1st Cir. 1990) (Massachusetts has "maximum possible development" standard), *cert. denied*, 499 U.S. 912 (1991); *Cothern v. Mallory*, 565 F.Supp. 701, 706-08 (W.D. Mo. 1983) (Missouri has "maximizes the capabilities" standard). Thus, Petitioner can ask the Colorado General Assembly to impose a higher state standard.[26] Given that IDEA

---

[26] The Petition argues that lower court rulings demonstrate that the two standards "have 'produced vastly different results for students with disabilities.'" Pet. 17. The Petition, however, supports this statement with a citation to an article that analyzes a single case. *Id.*, citing Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25, 32-39 (2012) (discussing *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2010)). The case analyzed by the article, however, held that there is no substantive distinction between "some" and "meaningful." *J.L.*, 592 F.3d at 951 n.10. Thus, the author's analysis is based on a distinction that was not recognized by the court.

Perhaps more revealing is the fact that cases applying "maximum benefit" standards do not represent outliers on the

funding covers only a small portion of the cost of the IDEA's obligations,[27] the decision to increase substantive IDEA standards inevitably requires states to spend state, not federal, money. The decision should be made the states, not federal courts.

CONCLUSION

WHEREFORE, the Douglas County School District RE-1 respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

W. STUART STULLER
Counsel of Record
CAPLAN AND EARNEST LLC
1800 Broadway
Suite 200
Boulder, CO 80302
(303) 443-8010
sstuller@celaw.com

Counsel for Respondent

April 15, 2016

---

spectrum of IDEA decisions. *Burilovich*, 208 F.3d at 565 (child's IEP satisfied Michigan's "maximum potential" standard); *Renner*, 185 F.3d at 645-46; *Roland M.*, 910 F.2d at 991-92 (child's IEP satisfied Massachusetts' "maximum possible development" standard); *Cothern*, 565 F.Supp. at 706-08 (child's IEP satisfied Missouri's "maximizes the capabilities" standard); *see also G.D.*, 930 F.2d at 950 (child's IEP satisfied New Hampshire's "equal educational opportunities standard").

[27] Clare McCann, *IDEA Funding*, New America EdCentral, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution (last visited April 11, 2016) (IDEA funding covered sixteen percent of the estimated excess cost of educating children with disabilities in fiscal year 2014).

APPENDIX

APPENDIX

20 U.S.C. § 1401(9)

(9) Free appropriate public education. The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(26)

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such

medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception

The term does not include a medical device that is surgically implanted, or the replacement of such device.

20 U.S.C. § 1401(29)

(29) Special education. The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 U.S.C. § 1412(a)(1)(A)

(a) In general. A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1414(d)

(d) Individualized education programs

(1) Definitions. In this chapter:

(A) Individualized education program

(i) In general. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.